(1) Supreme Court, U.S.
FILED

No. 991098 DEC 27 1999

OFFICE OF THE CLERK

IN THE
SUPRME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

MICHAEL BARTH,

PETITIONER,

v.

PUBLIC SERVICE ELECTRIC AND GAS; TOWNSHIP OF BERNARDS; BERNARDS TOWNSHIP SEWAGE AUTHORITY; BERNARDS TOWNSHIP BOARD OF HEALTH; BERNARDS TOWNSHIP MUNICIPAL COURT; J. KNOX FELTER, JR., Senior Sanitarian, Bernards Township; PETER A. MESSINA, P.E., P.P. Township Engineer/Planner; PEGGY WARREN, Certified Tax Collector, Bernards Township; BARBARA J. PENCE, Township Administrator; J. DOE(S), individually and in their official capacities; STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ITS COMMISSIONERS, and various New Jersey State Statutes; A.D. RUNYON OIL COMPANY; HARRY P. BELDON, Attorney at Law,

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
PETITION FOR WRIT OF CERTIORARI

BRIEF FOR PETITIONER

Michael Barth
P.O. Box 315
Liberty Corner, New Jersey 07938

38pp

QUESTIONS PRESENTED

Whether the New Jersey Court Rule 4:30A (Entire Controversy Doctrine) is unconstitutional under Article III, Section 2 and Article IV of the United States Constitution.

Whether Eleventh Amendment Immunity applies to New Jersey State Department of Environmental Protection and its Commissioner(s) when: District Court ruled plaintiff was entitled to sue the NJ DEP in Federal Court for a copy of a DEP report; NJ Statutes Expressly waived immunity by allowing the NJ DEP to be sued in "any court"; the NJ DEP admitted they could be sued in Federal Court under the New Jersey Tort Claim Act; the NJ Entire Controversy Doctrines requires suit in one forum; and defendants participated in discovery.

Whether Rule 56 Summary Judgment on Rule 12(c) motion for judgment on the pleadings is inappropriate when defendant did not comply with Rule 26(a) discovery Order.

Whether it is reversible error to dismiss Federal Natural Gas Pipeline Safety Act claim and refuse to issue order to show cause when District Judge admitted plaintiff entitled to injunctive relief under the Federal statute.

Whether Res Judicata applies when application previously rejected by United States Supreme Court in cases such as Montana v. United States, 99 S. Ct. 970, 973(1979).

Whether two attempts to influence Municipal Judge to deprive federal court of jurisdiction on removal shows pattern to satisfy Violation of RICO as articulated in United States Supreme Court cases including U.S. v. Russell, 225 U.S. 138 (1921).

Whether District Court sua sponte dismissal without giving plaintiff notice and an opportunity to be heard is reversible error when inopposite to Second Circuit Court of Appeals precedent. Thomas v. Scully, Thomas v. Scully, 943 F.2d 259, 260 (CA 2 1991); Perez v. Ortiz, 849 F.2d 793, 797 (CA 2 1988) on Constitutional Challenge to N.J. Entire Controversy Doctrine; New Jersey Eminent Domain

Statute; Freshwater Wetlands Protection Act and Rules; State and Local Laws related to Sewers; and RICO claims.

Whether in spite of sua sponte dismissal without opportunity to be heard, the following are unconstitutional under the Fourteenth Amendment of the United States Constitution: Freshwater Wetlands Protection Act and Rules; Bernards Township Local law related to sewers; Tax Sale and State Statute; N.J. Eminent Domain Act; and Sewer Tax.

Whether the Supreme Court ruling that Property Ownership is a fundamental property right in cases such as Loretto v. Teleporter, 458 U.S. 419, (1982) gives plaintiff standing under 42 U.S.C. § 1985.

Whether plaintiff had standing to sue under 42 U.S.C. § 4001 where NJ DEP and testimony before Bernards Township Planning Board indicated Bernards Township increased flooding in a flood zone adjacent to plaintiff's property.

Whether reversible error when District Court dismisses Federal Constitutional or 42 U.S.C. § 1983 Statutory Claims without reason in opposite to Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979) and since 1983 plaintiff is never required to exhaust state remedies under Patsy v. Florida Board of Regents, 457 U.S. 496 (1982); Mathews v. Eldridge, 424 U.S. 319 (1976) is the NJ Entire Controversy Doctrine unconstitutional and the notice provision of NJ Tort claim Act do not apply.

LIST OF PARTIES

PETITIONER - PLAINTIFF
MICHAEL BARTH

RESPONDENTS - DEFENDANTS

PUBLIC SERVICE ELECTRIC AND GAS;

TOWNSHIP OF BERNARDS; BERNARDS TOWNSHIP SEWAGE AUTHORITY;
BERNARDS TOWNSHIP BOARD OF HEALTH;
BERNARDS TOWNSHIP MUNICIPAL COURT;
J. KNOX FELTER, JR., Senior Sanitarian, Bernards Township;
PETER A. MESSINA, P.E., P.P. Township Engineer/Planner;
PEGGY WARREN, Certified Tax Collector,
Bernards Township;
BARBARA J. PENCE, Township Administrator;
J. DOE(S), individually and in their official capacities;

STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ITS COMMISSIONERS, (herein also referred to as NJ D.E.P. defendants)

various New Jersey State Statutes;

A.D. RUNYON OIL COMPANY;
HARRY P. BELDON, Attorney at Law,

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IN THE
SUPRME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below in the Third Circuit Court of Appeals in Barth v. PSE&G et al: Order filed September 28, 1999 affirming District Court Order filed February 22, 1999 CA 3 Docket 99-5190; Denial of Petition for Rehearing in CA3 Dockets 97-5368 & 98-5059; and Court of Appeals' order affirming district court order entered May 7, 1997 (denial of order to show cause for a preliminary injunction) and June 18, 1997 (denial of stay of state court proceedings and reassignment to Newark).

OPINIONS BELOW

The Opinion in Third Circuit Docket 99-5190 (affirming District Court Order filed February 22, 1999) is not designated for printing according to the Third Circuit Order. There was no printing designation on the Third Circuit orders in 97-5368 or 98-5059. It appears the the District Court's Opinion in 97-2163 is not for publication.

JURISDICTION

The United States Supreme Court has jurisdiction under 28 U.S.C. § 1254. This matter was final before the Third Circuit Court of Appeals when an Opinion was filed on September 28, 1999.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Appendix includes the following: Articles I, III and IV; and Amendment V, XI, and XIV; 18 U.S.C. § 1503; 18 U.S.C. § 1961; 42 U.S.C. § 1983; 42 U.S.C. § 1985; 42 U.S.C. § 4001; 49 U.S.C. 60101 et. seq.; 49 U.S.C. §60118(a)(1); 49 U.S.C. §60121; 49 App. § 60101 et. seq.; 49 App. §60121; and 49 C.F.R. 192.327.

SUMMARY STATEMENT OF CASE AND RELATED CASES AND PROCEEDINGS

The relevant facts and the proceedings that took place in the lower courts are as follows.

On March 25, 1997, A.D. Runyon Company filed suit against Mr. Barth, in Superior Court of New Jersey, Law Division, Special Civil Part. Docket 979-97 (PA 85). Consistent with the New Jersey Entire Controversy Doctrine, Mr. Barth countered sued Runyon Oil and its attorney in federal district court. Complaint ¶ 89-95. The complaint stated in part that Runyon Oil failed to deliver the proper number of gallons for oil that would have facilitated the winter relocation of the oil tank in Mr. Barth's home necessary to complete the unreasonable forced connection to the Bernards Township's sewer system. Runyon Oil and its attorney Harry Beldon settled out of court with Mr. Barth. Stipulation of dismissals was filed in New Jersey Superior Court on June 19, 1997 and in Federal district Court in the instant action on August 26, 1997. District Court Docket No. 20.

The New Jersey Department of Environmental Protection N.J.D.E.P.E. ruled that all wetlands on Mr. Barth's property were of the most minimal resource value. (Property located at Block 133, Lot 4, Bernards Township, Somerset County, New Jersey.) PSE&G originally sought this interpretation and received a stream crossing across plaintiff's property. Complaint at 84. Plaintiff also sought a wetland delineation based on that same wetland classification. Mr. Barth relied on that same classification by the DEPE and had two additional sewer laterals installed to subdivide the property as agreed upon by Bernards Township and also to have the property zoned for raising and keeping of livestock. Both were done at substantial expense to Mr. Barth.

Subsequently on November 22, 1995, the N.J.D.E.P.E arbitrarily ruled that the wetlands on Mr. Barth property included exceptional valued wetlands and that Mr. Barth should get a new interpretation and formal delineation of the wetlands for his use of the property but the NJ DEPE refused to require PSE&G to get a new interpretation of

the same wetlands on Mr. Barth's property that PSE&G intended to destroy for its planned condemned use of Mr. Barth's property.

Mr. Barth requested an Order to Show Cause why the N.J.D.E.P.E. should not be ordered to provide plaintiff with a copy of a report, NJ DEP file No. 02-010-96. The report was the D.E.P.E. investigation of a Bernards Township Road Regrading Project that caused flooding on plaintiff's property. The District Court rejected plaintiff's request for an order to show cause saying it was cause the NJ DEPE irreparable harm. Amended Order May 6, 1997. In the District Court's subsequent order dismissing the complaint, Judge Thompson ruled that plaintiff was in fact to entitled to bring a cause of action in Federal District Court to obtain a copy of the DEPE report but ruled that the claim was moot since the D.E.P.E. provided plaintiff with a copy of the report. Opinion February 19, 1999.

PSE&G contacted plaintiff to obtain an easement to run a gas pipeline across Mr. Barth's property. Mr. Barth indicated a lack of interest unless PSE&G agreed to indemnify Mr. Barth for any loss, damages, or otherwise. PSE&G requested permission to do environmental tests on plaintiff's property and entered an six-month agreement on June 28, 1993, to reimburse and indemnify landowner for property damage and that PSE&G would give Mr. Barth three days notice before any entry upon Mr. Barth's land.

PSE&G's contractors damaged Mr. Barth's property including irreparable damage to a row of Spruce Trees. PSE&G refused to honor its agreement to compensate Mr. Barth for the damage caused by its contractors so Mr. Barth refused to enter into an easement agreement with PSE&G. PSE&G went ahead without permission and installed a "temporary gas line" on the street over the bridge adjacent to the southwest corner of plaintiff's property. Complaint at 51. The pipe was laid on the deck of the bridge and was paved over with no other protection. Beams for a guardrail were driven into the ground inches from the pipeline. A PSE&G appraiser certified that on February 4, 1994 he entered upon plaintiff's property. This was without permission as the six-month agreement terminated on December 28, 1993. PSE&G's gas pipeline adjacent to plaintiff's

property was ruptured by Bernards Township contractors. The contractors asked Mr. Barth to call 911 on their behalf.

On March 26, 1997, PSE&G filed suit to condemn Mr. Barth's property in the Law Division of the Superior Court of New Jersey. Mr. Barth filed suit against PSE&G in federal district court for matters that included items the NJ Office of Administrative law indicated could not be combined in a condemnation proceeding. Default was entered against PSE&G on August 22, 1997 for those claims Mr. Barth filed against PSE&G. The PSE&G state based complaint against Barth was dismissed on June 13, 1997. On June 15, 1997, Judge Thompson denied plaintiff's request for an order to show cause to enjoin the related state court actions PSE&G v. Barth. The New Jersey Appellate held that PSE&G's condemnation action against Mr. Barth was final for appeal on October 22, 1999.

The New Jersey State court and previous OAL proceedings were filled with procedural infirmities. For example: Mr. Barth was not served by the Board of Public Utilities with the required notice of the condemnation; The case was removed from the NJ OAL to Federal District Court, remanded to the BPU at the request of the NJ Attorney General's Office, and never transferred again to the NJ OAL; The NJ OAL refused to hear related pipeline safety issues; The OAL would not allow Mr. Barth to call witnesses; The OAL relied upon transcripts that PSE&G provided the OAL that PSE&G refused to provide a copy to Mr. Barth; The NJ superior court judge provided direction to the condemnation commissioners and copies PSE&G with its correspondence but did not provide Mr. Barth with a copy; The trial judge refused to allow Mr. Barth to file an Answer; The condemnation commissioners did not provide Mr. Barth notice of the hearing as required by court order or state law; The Commissioner's relied upon evidence provided by PSE&G that was never served upon Mr. Barth; and the Condemnation commissioner was called by PSE&G as its witness in the state court proceeding when state statute required the Commissioner be called as the court's independent commissioner. Subsequently, the Bernards Township engineer department provided evidence that PSE&G title search of Mr. Barth's property was defective and that PSE&G had installed its pipeline on

Mr. Barth's property that was not within any Township recorded right of way.

On December 5, 1995, Bernards Township filed suit against Barth in Bernards Township Municipal Court. Municipal Court Docket No. 1372 (PA 83). Mr. Barth removed the case to federal district court to challenge, the constitutionality of the Bernards Township ordinance. New homes are still being built in the township with septic systems, including a proposed septic system on property within 200 feet of plaintiff's property that will support a building over 60,000 square feet. The Municipal Judge admitted he was not a constitutional court. During the Municipal Proceeding, the Bernards Township Municipal Judge, the Township Prosecutor, and Defendant Felter huddled around the judge's desk in open court, with the judges hand over the microphone. They plotted how to deal with the case in Bernards Township Municipal court to defraud the federal district court out of jurisdiction of that proceeding that Barth had removed to federal court. At the end of the proceeding, the Municipal Judge called the Township Administrator to discuss the case ex parte. (During discovery, the Administrator admitted the Judge called her out in open court to discuss an issue ex parte but she indicated this was a different case they discussed ex parte.) Plaintiff ordered a tape copy of the municipal proceeding but received a copy with several portions deleted. The Municipal Court refused to provide complete copies of the tape recording taking place during that time. Because of the procedural deprivations in Municipal court, plaintiff was forced to connect to the township sewers. This caused undue hardship to plaintiff's property and required the relocation of the oil tank.

By letter dated March 6, 1997, Bernards Township indicated it planned to sell Barth's property in a tax sale for unpaid sewer taxes. Mr. Barth notified the Township that it disputed the amount the township indicated was owed but was not given an opportunity to dispute the amount. The property was sold in a tax sale. Mr. Barth paid the taxes due to the improprieties in the Township proceedings.

Bernards Township admitted during discovery that its storm sewers owned are installed below ground on landowner's private property and outside the Town's right-of-way. Bernards Township re-graded the

road bordering the south of the subject property that created, in effect, a weir dam, subjecting the landowner's property to additional flooding. As stated, the NJ D.E.P. concluded that Bernard Township did raise the road and cause additional flooding of plaintiff's property but refused to turn over a copy of their report. Bernards Township also negligently redesigned the Road that borders the front of plaintiff's property that causes water to run down and floods plaintiff's driveway. (The township installed a storm basin on the road downhill from plaintiff's driveway. The water basically runs along 800 feet of curbed roadway before it passes plaintiff's driveway and enters the basin.) Bernards Township also negligently constructed a storm water system that creates underground flooding on plaintiff's property.

Consistent with the New Jersey Entire Controversy Doctrine, on April 17, 1997, Barth filed in Federal District Court, Newark New Jersey, suit against PSE&G, A.D. Runyon Company and its attorney Harry Beldon, "Bernards Township" defendants, the State of New Jersey "defendants" various state laws, court rules, and local ordinances.

By letter dated April 14, 1997, Barth asked for the following Show Cause Order: Order PSE&G to remove a temporary natural gas pipeline that was installed adjacent to plaintiff's property in violation of the Federal and New Jersey Pipeline Safety Acts; Enjoin Bernards Township Tax Sale of plaintiff's property; Order Bernards Township Municipal Court to plaintiff a copy of a tape recordings of a related Municipal Court hearing; Order Bernards Township to remove Township's storm pipes illegally placed under plaintiff's property; Order Bernards Township to remove the road that is causing flooding on plaintiff's property; Order Bernards Township to remove the underground flooding of plaintiff's property caused by their improperly constructed storm sewers; Order Bernards Township to correct the flooding condition of plaintiff's driveway caused by the improper construction of a road and storm sewer system they own in front of plaintiff's property; and Order the N.J. D.E.P. to provide plaintiff a copy of a D.E.P. report indicating that Bernards Township illegally raised the level of a road in a flood plain causing additional flooding to plaintiff's property. Judge Thompson denied the request for an order to show cause on May 7, 1997.

Default was entered against PSE&G and Bernards Township Sewage Authority on August 22, 1997. PSE&G complaint against Barth was dismissed on June 13, 1997. On June 15, 1997, Judge Thompson denied plaintiff's request for an order to show cause to enjoin the related state court action PSE&G v. Barth.

Plaintiff filed a notice of appeal of both denials: CA 97-5368 and 98-5059. Plaintiff also filed a motion to have the case transferred upon remand and disqualify Judge Thompson from the case because she erroneously decided a motion before the return date when the change of the status of a case sought to be stayed had been communicated to her honor.

Honorable Freda L. Wolfson, United States Magistrate Judge, ruled on October 22, 1998 was discovery was not stayed and that interrogatories served and answers due prior to the date on which a motion for summary judgment was filed must be answered. Docket entry 74. Judge Wolfson ordered defendants including the NJ D.E.P. to provide initial disclosure. Docket entry 53. During a teleconference with Judge Wolfson, counsel for the N.J. D.E.P. requested an extension for its discovery. July 17, 1998.

PSE&G illegally entered plaintiff's property in early September but Judge Thompson refused to act on plaintiff's request to enjoin PSE&G. The Bernards Township Planning Board was reviewing an application on property within 200 feet of plaintiff's that included the construction of a mammoth septic field and raising the flood plain. Judge Thompson refused to issue an order to show cause to halt either action.

Judge Thompson dismissed the complaint and denied plaintiff's cross-motions. The Court of Appeals affirmed the District Court opinion without oral argument and without reference to any case law.

REASONS FOR GRANTING THE PETITION

There are compelling reasons for the exercise of the Court's discretionary jurisdiction in this matter. Not only is the decision of the lower court erroneous but there is national importance in having the Supreme Court decide the questions involved. The decision of the court below is in conflict with previous decisions of this court.

POINT I New Jersey Court Rule 4:30A (Entire Controversy Doctrine) is unconstitutional under Articles III, § 2 and Article IV § 1 of the U.S. Constitution and the Due Process Clause of the Fourteenth Amendment.

Under Counts 73 through 75, NJ Court Rule 4:30A ("Entire Controversy Doctrine") violates Articles III, § 2 and Article IV § 1 of the U.S. Constitution and the Due Process Clause of the Fourteenth Amendment. The Doctrine violates Article III, § 2 of the United States Constitution which authorizes federal courts to decide only "cases" or "controversies." It also violates Article IV § 1 of the Constitution which states that "full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other States; And the Congress may be general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." It also violates the Due Process Clause of the Fourteenth Amendment. Complaint at paragraph 97.

Judge Thompson admitted the rule is burdensome but dismissed the claim *sua sponte*. Opinion, February 22, 1999, page 24. The Rule is promulgated by the New Jersey Supreme Court and accordingly cannot be challenged in New Jersey State court because of the inequality of forums. (Citation omitted.) Mr. Barth was unnecessarily sued in several different New Jersey state forums that under the ECD required counter-suit in one forum. In the interest of justice, Mr. Barth sued defendants in one forum, federal district court.

The Doctrine is unconstitutional in that it fosters uncertainty in an area of law that must remain clear. The doctrine is overly burdensome and the application too arbitrary, particularly when someone attempts to exhaust administrative remedies. The Doctrine

basically requires someone to bring cases that have not yet ripened. In effect, the doctrine wrongfully deprives one of his or her "day in court". Under the New Jersey Entire Controversy, any dismissal of the complaint against any defendant for not utilizing state procedures (regardless of the futility of utilizing the state procedures) should have been without prejudice. The doctrine cannot be relied upon as faithful. Accordingly, the rule or Doctrine should be declared unconstitutional under Articles III, § 2 and Article IV § 1 of the U.S. Constitution and the Due Process Clause of the Fourteenth Amendment.

POINT II Eleventh Amendment Immunity does NOT apply to the New Jersey State Department of Environmental Protection where the District Court ruled plaintiff was entitled to sue the NJ DEP in Federal Court for a copy of a DEP report; where the New Jersey Statute Expressly waived immunity by allowing the NJ DEP to be sued in "any court"; where the defendants admitted they could be sued in Federal Court under the New Jersey Tort Claim Act; where the NJ Entire Controversy Doctrines requires suit in one forum; and where defendants participated in discovery.

The N.J. D.E.P. Violated Plaintiff's Rights Protected by the Fifth and Fourteenth Amendments; 42 U.S.C. § 1983, and Article I of the N.J. Constitution. Complaint Counts 45 through 48.

Judge Thompson ruled plaintiff could bring an actionable claim in Federal District Court against the NJ D.E.P.E. and its Commissioner to produce a report under, *inter alia,* the New Jersey right to know statute N.J.S.A. 47:1A-1 *et seq.*, and the common law right to know. Plaintiff requested the NJ D.E.P. investigate Bernards Township's raising of the Minebrook road surface in a flood plain. Complaint para 20. The DEP report concluded Bernard Township did raise the road and cause additional flooding of plaintiff's property. The District Court refused to grant an order to show cause why the DEPE should not produce the report saying it would cause the DEPE "irreparable harm". However, under the statute cited by Judge Thompson, plaintiff is entitled to costs incurred to file suit to force the DEP defendants to provide a copy of the report, including costs on appeal. N.J.S.A. 47:1A-1 *et seq.* The court ruling that the claim was

mooted is inconsistent with the court's own standard and reversible error including its May 7, 1997 denial of plaintiff's request for an order to show cause.

Judge Thompson stated New Jersey could waive its Eleventh Amendment immunity. By the DEPE's own admissions, suit against the State of New Jersey, Department of Environmental Protection, and its Commissioners was not prohibited by Eleventh Amendment. There are a number of ways immunity was expressly waived under the New Jersey statutes. For example: The DEPE defendants plainly consented to suit in federal district court in the most express language. Defendants argued they are liable for suit in Federal District Court under the New Jersey Tort Claims Act. They admit the constitutional claims can be brought them in Federal District Court. They participated in discovery and even asked for an extension for discovery. Moreover, under New Jersey law, private citizens are allowed to bring suit in Federal Court against the New Jersey Department of Environmental Commission, its Commissioner(s) and any related rules. N.J.S.A. 2A:35A-4, 10 (bring suit against DEP in any court). The New Jersey Entire Controversy Doctrine Rule expressly waives immunity from suit in federal court as it requires suit in one forum. The Eleventh Amendment does not immunize unconstitutional acts of the DEP defendants. Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982). Furthermore, the New Jersey statutes define the DEP defendants as "persons" for the purposes of 42 USC §1983. *See* N.J.S.A. 2:35A-3; 58:16A-51 (agency of the state is a "person").

POINT III Rule 56 Summary Judgment on Rule 12(c) motion for judgment on the pleadings inappropriate when defendants not in compliance with Rule 26(a) Order requiring compliance with Discovery request.

By Judge Thompson own holding, it was reversible error to grant Summary Judgment on a Rule 12 C judgment on the pleading; to quash plaintiff's interrogatories; and deny plaintiff's motion to compel discovery. Freda L. Wolfson, United States Magistrate Judge, ruled on October 22, 1998 that discovery was not stayed and that interrogatories served and answers due prior to the date on which a

motion for summary judgment was filed must be answered. Docket No. 74. Judge Wolfson ordered on February 18, 1998 that the NJ DEP defendants provide initial disclosure as required by F.R.C.P. 26(a). Id. at 53. At a pretrial conference, N.J. D.A.G. Patterson asked for an extension of discovery. Furthermore, on October 2, 1998 counsel for the N.J. D.E.P, the N.J. Attorney General's Office indicated it would answer plaintiff's interrogatories within two weeks. On or about October 23, 1998 the N.J.D.E.P moved for judgment on the pleadings (returnable November 16, 1998). On or about November 13, 1998, the N.J.D.E.P. moved to quash plaintiff's interrogatories (returnable December 7, 1998). The DEP defendants omitted a statement of material facts as required by the local rules of court. The District Judge held that plaintiff did not provide sufficient evidence to preclude dismissal of the complaint. Opinion, February 22, 1999 page 20. However, the moving party never satisfied its burden as required by Supreme Court precedent. Accordingly, it was clearly an error to grant summary judgment on a motion for judgment on the pleadings. At a minimum, the dismissal should have been without prejudice.

POINT IV Reversible error to dismiss Federal Natural Gas Pipeline Safety Act claim and refuse to issue order to show cause when District Judge admitted plaintiff entitled to injunctive relief under the Federal statute.

Under counts 49 and 50 PSE&G is liable for violating the Federal Natural Gas Pipeline Safety Act and the New Jersey Natural Gas Pipeline Safety Act. Judge Thompson ruled PSE&G was required to comply with federal and state pipeline safety standards. Opinion filed February 22, 1999 *citing* 49 U.S.C. §60118(a)(1); N.J. Stat. Ann. 48:9-33. PSE&G was required to construct this pipeline in accordance with the Minimum Federal Safety Standards of the U.S. Department of Transportation as published in Part 192 of Title 49, Code of Federal Regulations, and any amendments thereof. Under that code, each main must be installed with at least 24 inches of cover. CFR Section 192.327. Under New Jersey law, "such pipes or conduits shall be laid at least 2 feet below the surface of the road and shall not damage private property. N.J.S.A. 49 App. § 60101 *et. seq.* states that it is a violation of Federal Law to construct a gas pipeline

in violation of Federal Regulations. 49 App. §60121 states that citizens may commence a civil action for relief against any person violation this chapter. N.J.S.A. 48:9-33 provides that it is a violation of State law to construct a natural gas pipeline that violates federal standards. The purpose of the law is to bring New Jersey into compliance with federal safety regulations. In constructing a pipeline in violation of Federal and State Law, PSE&G is liable for violating the Natural Gas Pipeline Safety Act for $10,000 a day from August 3, 1993 or $500,000 and liable to the landowner for violating the New Jersey Natural Gas Pipeline Safety Act in the amount of $10,000 a day from August 3, 1993 or $500,000. A private person is permitted to bring an action for damages other than costs and fees under federal law 49 U.S.C. §60121 and a private person is also permitted to bring an action for injunctive or compensatory relief under state law. N.J. Stat. Ann. 48:9-33(c). *See e.g.,* Atlantic City Gas & Water Co. v. Consumers' Gas & Fuel Co., 70 N.J. Eq. 536 (Ch. 1905) (Showing special damage private party can bring action under state statute.) N.J.S.A. 48:7-2.

PSE&G has created a public safety hazard. It is undisputed that on or about August 3, 1993, PSE&G contractors installed a "temporary gas line" on the street over the bridge adjacent to the southwest corner of plaintiff's property. Complaint para. 51. PSE&G testified before the New Jersey Office of Administrative Law that the pipe was laid on the deck of the bridge and paved over with no other protection. By PSE&G own admission, PSE&G did not construct the pipeline in accordance with these rules requiring 24 inches of cover. Beams for a guardrail have been driven into the ground inches from the pipeline. Plaintiff provided pictures that a jury could review and clearly determine PSE&G is liable on these counts. In addition, with additional discovery, PSE&G should be ordered to produce copies of the recent PSE&G video taping of work done on the pipeline that crossed appellant's property.

Judge Thompson incorrectly assumed that since plaintiff had not provided an expert report, plaintiff could not set forth any actual evidence that creates a genuine issue of material facts. However, she inappropriately misapplied the standard for summary judgment as

PSE&G's purported Local Rule 12(G) statement of "material facts" did not address the facts.

Judge Thompson ruled Barth was permitted to bring an action under federal law for injunctive relief to ensure compliance with such standards. Moreover, PSE&G admitted the plaintiff was entitled to costs and fees for suing for injunctive relief. Without basis the District Court rejected Mr. Barth's request for an order to show cause for injunctive relief. By Judge Thompson's own admission, she was required and erred in not issuing the order to show cause she denied on May 7, 1997 and she erred in granting PSE&G summary judgment.

POINT V District Court's application of Res Judicata previously rejected by United States Supreme Court in cases such as Montana v. United States, 99 S. Ct. 970, 973(1979).

Judge Thompson order of February 19, 1999 barred plaintiff claims against PSE&G on the basis of res judicata. However, the New Jersey state court case she relied upon was not determined to be final until October 22, 1999. (See Appendix.) According to the standard set in cases such as Montana v. United States, 99 S. Ct. 970, 973(1979), the federal litigation could not be precluded by a state court case.

On March 26, 1997, PSE&G filed suit against Barth, in Superior Court of New Jersey, Law Division. Docket SOM-L-549-97. Consistent with the New Jersey Entire Controversy Doctrine, on April 17, 1997, Barth filed in Federal District Court, Newark New Jersey, suit against PSE&G. On June 15, 1997, Judge Thompson denied plaintiff's May 13, 1997 request for an order to show cause to enjoin the state court action PSE&G v. Barth. In doing so, the District Court surrendered jurisdiction to the state court in opposite to Supreme Court cases such as Moses H. Cone Memorial Hosp. V. Mercury Const. 460 U.S. (1983). Moreover, default was entered against PSE&G in the instant case on August 22, 1997 (Appendix). Furthermore, PSE&G complaint against Barth was dismissed without prejudice on June 13, 1997. Morris County v. 8 Court Street Ltd. 223 N.J. Super. 35 (A.D. 1998). The New Jersey action she relied

upon lacked jurisdiction to hear PSE&G claims once Barth filed suit in federal court and PSE&G complaint was dismissed.

The instant litigation is not precluded on *res judicata* grounds as any remedies provided under state law were inadequate and foreclosed. There was nothing presented by PSE&G that would indicate the state court considered the matters before this court. By PSE&G own admission, the federal litigation was not precluded on *res judicata* grounds. They admit the New Jersey state court never actually litigated the claims such as trespass and other property deprivation raised in the instant case. PSE&G also admits the state court granted PSE&G the right to take appellant's property while in default in federal district court. For PSE&G to argue the default was irrelevant is to admit the state case was not preclusive. Furthermore, by PSE&G own claims, it violated due process for the state court to grant PSE&G the right to condemn when they were in default on claims that PSE&G admits if true would prohibit them from exercising the power of eminent domain. Not surprising but proof that this case is not precluded is the fact that PSE&G is currently arguing in state court that Mr. Barth request to file an Answer in state court is precluded by the federal case. For PSE&G to argue the state case is precluded by the federal case is an admission that the federal case is not precluded by the state case.

Moreover, PSE&G admitted the state court never considered the entire controversy as presumably the state court deferred to the federal court to litigate the remaining claims. On its face this shows the state court proceedings constitutionally infirm. Furthermore, PSE&G themselves admitted the state proceedings were null and void based on their defective title search. They themselves admit that appellant has to initiate an inverse condemnation claim against PSE&G to complete compensation for the rest of the pipeline on appellant's property. PSE&G offers no support how that translates to constitutional due process. Accordingly, the instant litigation was not precluded.

Under counts 54-61, PSE&G is liable for trespass and destruction of trees; Breach of Contract; Trespass to Land; Negligence; Bad Faith; and Waste. PSE&G never disputed the existence of a contract

between Barth and PSE&G. Apparently Judge Thompson was not sure whether plaintiff's case was barred by claim preclusion so the District court raised a Tort Claims Act defense for PSE&G that PSE&G never raised. Opinion February 22, 1998, note 1. The District Court dismissed tort claims against PSE&G sua sponte without giving plaintiff an opportunity to be heard. PSE&G never raised the defense of the New Jersey Tort Claims Act as it does not apply to PSE&G. N.J.S.A. 59:1-1. She erroneously concluded this precluded the claims for trespass, negligence and waste.

POINT VI Two incidents of attempt to influence Municipal Judge to deprive federal court of jurisdiction shows pattern to satisfy Violation of RICO as articulated in United States Supreme Court cases including U.S. v. Russell, 225 U.S. 138 (1921).

In the instant case for example, defendants had knowledge and notice of a pending judicial proceeding in Federal Court. Township of Bernards v. Barth v. Bernards Township Sewage Authority et al 95 Civ. 6485 (AET). Defendants acted corruptly, that is, with the intent to influence, obstruct, or impede the Federal Proceedings in its due administration of justice. For example: The Bernards Township Municipal Judge, the Township Prosecutor, and Defendant Felter (the plaintiff in that case) huddled around the judges desk in open court, with the judges hand over the microphone, and plotted how to deal with the case in Bernards Township Municipal court to defraud the federal district court out of jurisdiction of that proceeding that Barth had removed to federal court. Complaint paragraph 39. Mr. Barth was not permitted to join their "side-bar" conversation but could hear them whispering. Furthermore, at the end of the second municipal hearing, the Judge called Township Administrator Barbara Pence forward to speak with him about the case. A pattern was shown when Defendant Pence answered in an interrogatory that yes the judge once called her forward to speak about the case. Defendant Pence claimed it was a different case she was going to talk about ex parte. This proved a pattern. Obstruction of justice is a violation of the RICO laws. 18 U.S.C. § 1961 citing § 1503. A visit alone is punishable. U.S. v. Russell, 255 U.S. 138 (1921). Corrupt endeavor spells out the crime although success may aggravate the crime. U.S. v. Solow,

138 F. Supp. 812 (D.C.N.Y. 1956). Accordingly, it was reversible error to dismiss the RICO claims.

The municipal court refused to provide a complete copy of the tapes of the hearing on January 30, 1996, Township of Bernards v. Barth, C-2161. Under Counts 31 through 32, Bernards Township Liable for Violating the New Jersey "Right to Know Law", N.J.S.A. 47:1A-1 *et seq.*, and the Common Law right to know. This relates to complete transcripts of the municipal court hearing on January 30, 1996, Township of Bernards v. Barth, C-2161. Complaint paragraphs 39 - 42. The Bernards Township Municipal Court refused to provide plaintiff with a complete copy of a tape recording of a Municipal Court hearing but had portions deleted from the copy provided to the landowner. Judge Thompson admitted plaintiff was entitled to a copy of the entire proceeding. As a matter of law, this should include that portion related to the period when the Municipal Judge, the Municipal Prosecutor, and defendant Felter gathered around the judges chair for a side-bar conversation that excluded Mr. Barth who was being accused in that matter.

Contrary to Judge Thompson's claim there is no proof Mr. Barth ever received such a complete copy. If such a copy exists, the Bernards Township defendants should provide a copy to the court and serve on all counsel in this matter. Moreover, Judge Thompson's suggestion plaintiff should apply to New Jersey Superior Court for a copy of the transcripts and tapes is reversible error. Plaintiff was entitled to a copy through discovery and judge Thompson committed reversible error in not ordering that plaintiff receive a copy. By opposing counsel's own admission, plaintiff was only provided what the Municipal Court Administrator deemed "relevant".

POINT VII District Court sua sponte dismissal without giving plaintiff notice and an opportunity to be heard is inopposite to Second Circuit Court of Appeals precedent. Thomas v. Scully, 943 F.2d 259, 260 (CA 2 1991); Perez v. Ortiz, 849 F.2d 793, 797 (CA 2 1988) on Constitutional Challenge to N.J. Entire Controversy Doctrine; New Jersey Eminent Domain Statute; Freshwater Wetlands Protection Act and Rules; State and Local Laws related to Sewers; and RICO claims.

The District Court sua sponte dismissal without giving plaintiff notice and an opportunity to be heard is inopposite to Second Circuit Court of Appeals precedent. Thomas v. Scully, 943 F.2d 259, 260 (CA 2 1991); Perez v. Ortiz, 849 F.2d 793, 797 (CA 2 1988) on Constitutional Challenges to the N.J. Entire Controversy Doctrine; the New Jersey Eminent Domain Statute; the Freshwater Wetlands Protection Act and Rules; State and Local Laws related to Sewers; and RICO claims.

Judge Thompson admitted that no defendant defended the constitutional challenge to the Bernards Sewer tax. District Court Order February 19, 1999. Judge Thompson admitted that no defendant defended the constitutional challenge to the New Jersey Eminent Domain Statute. District Court Order February 19, 1999. Judge Thompson admitted that no defendant defended the constitutional challenge to the New Jersey Entire Controversy Doctrine. District Court Order February 19, 1999. Under Counts 42 through 44, The N.J.S.A. 13:9B-1 *et seq.* (Freshwater Wetlands Protection Act) and N.J.A.C. 7:7A-1 *et seq* (Freshwater Wetlands Protection Act Rules) are Unconstitutional. Judge Thompson stated no defendant defended the constitutionality of the Act or the Rules. Opinion filed February 22, 1999 page 19. Judge Thompson committed reversible error in dismissing Counts 42 through 44 without an opportunity to be heard. F.R.C.P. 12(b)(6).

The district court erred by dismissing *sua sponte* RICO claims when defendants admit they did not move to dismiss claim that Bernards Township, the Bernards Township Board of Health, the Bernards Township Sewerage Authority, J. Knox Felter, Jr., Barbara J. Pence are liable for violating 18 U.S.C. § 1961 et seq. (RICO). See Opinion, February 22, 1999; Reply Brief, Yurasko page 2.

Opposing counsel admits he did not move to dismiss the RICO claims against the Bernards Township Non-Inverse Defendants and that the district court dismissed the count *sua sponte*. Plaintiff provided a legal basis for the RICO claims. Bernards Township Non-Inverse Defendants liable for violating RICO.

A district court may not dismiss a complaint *sua sponte* without giving the plaintiff an opportunity to be heard. Her *sua sponte* dismissal was reversible error.

Moreover, Judge Thompson provided no basis for dismissing the counts that Bernards Township, the Bernards Township Board of Health, the Bernards Township Sewerage Authority, J. Knox Felter, Jr., Barbara J. Pence, are liable for Fraud, Malicious and Tortious Interference with a Contractual Relationship, Malicious Prosecution, Abuse of Process, Negligence. Complaint paragraph 44. Her scattergun approach to apply the Tort Claim act was reversible error. Judge Thompson provided not basis for dismissing the count of Malicious Prosecution and provided no basis whatsoever for dismissing the count of Wrongful Interference. The court was required to accept as true that on or about December 5, 1995, J. Knox Felter Jr., Bernards Township Sanitarian, filed a summons in Municipal Court, Bernards Township. Township of Bernards v. Barth, C-2161. Complaint Paragraph 37. In that summons, Bernards Township alleges that the landowner failed to connect property into the sanitary sewer within the required time period in violation of the Township Ordinance BH: 13-2.2. There was no probable cause for the issuance of such an order. Accordingly, Mr. Felter, Bernards Township, the Sewerage Authority and the Bernards Township Board of Health are liable for Malicious Prosecution and for the wrongful interference with plaintiff's possession and enjoyment of property. Judge Thompson never addressed the issue of wrongful interference with possession and enjoyment of property. Again, the scattergun approach to applying the Tort Claim act to these counts fails. Under Counts 10 and 11, Bernards Township is liable for Trespass-Destruction of Property and Nuisance. It is not clear on what basis Judge Thompson dismissed this count. If on the basis of the Fourteenth Amendment, that was reversible error. Alternatively, the counts are still valid as Judge Thompson never dealt with the counts. As stated in the Complaint, Bernards Township continues to trespass on landowner's property through the unconstitutional taking without compensation. Id. at 22. There is substantial damage to landowner's property resulting from the trespass. Id. Defendants are interfering with the use and enjoyment of defendant's property. Id. at 24.

Therefore, Bernards Township is liable for trespass and destruction of plaintiff's property and liable for creating a nuisance.

POINT IX In spite of sua sponte dismissal without opportunity to be heard, the following are unconstitutional under the Fourteenth Amendment of the United States Constitution: Freshwater Wetlands Protection Act and Rules; Bernards Township Local law related to sewers; Tax Sale and State Statute; N.J. Eminent Domain Act; and Sewer Tax.

Barth owns the property that the NJDEP ruled on the wetlands classification. For the same piece of Barth's land the NJ DEP ruled that for PSE&G the wetlands are of the most minimal resource value and the DEP granted PSE&G a stream encroachment permit for that portion crossing plaintiff's property. Conversely, for Barth, who owns a fundamental constitutionally protected right, the DEP ruled the wetland is of the most protected value. This impacts plaintiff's ability, for example, to subdivide the property. The NJ DEP refused to require PSE&G to have the land redelineated but requires plaintiff to have the land redelineated. The DEP arbitrarily and discriminatorily applied the law and arbitrarily and discriminatorily treated PSE&G and Barth differently. The arbitrary enforcement means the law and rules are vague. Without discover, the Complaint clearly shows the Act or its regulations are vague on their face or as applied. Grayned v. City of Rockford, 408 U.S. 104, 108-109 (vague law impermissibly delegates basic policy matters to ... for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.) The Wetlands Protection Act Rules are part of the New Jersey Department of Environmental Protection. Opposing counsel does not dispute that his clients classified the wetland's of plaintiff-appellant' property at a lower standard for PSE&G and a higher standard for Mr. Barth. She argues this is consistent with state statutes, rules or otherwise. Such an admission of the opposing party is *prima facie* proof of unconstitutionality. Moreover, those wetlands identified by the defendants as exceptional would by their own standards be federal protected priority wetlands and accordingly the instant claims within the jurisdiction of a federal court. Judge Thompson erroneously ruled there was no evidence that the Act or its regulations are vague on their

face or as applied. Opinion, February 28, 1999. However, accepting the complaint as true, it is clear the Act and its regulations are vague on their face or as applied. Accordingly, the act and rules are unconstitutional under the Fourteenth Amendment of the United States Constitution.

Bernards Township Local law related to sewers are unconstitutional. The Bernards Township Board of Health Ordinance BH:13-2.2 is unconstitutional under *U.S. Const.* Amend XIV; 42 U.S.C. § 1983; *N.J. Const.* Art. I, par. 1. A Township Ordinance is a state statute for purpose of review by a Federal Court. *See e.g.,* First Lutheran Church v. Los Angeles County, 482 U.S. 304 n. 8 (1987) *citing* Erznoznik v. City of Jacksonville, 422 U.S. 205, 205 n. 3 (1975)

Judge Thompson indicated *sua sponte* there was no evidence that the statute or ordinance were vague on its face or as applied. Opinion, February 22, 1999. However, the record was packed with evidence the statute and ordinance were vague. For example, Bernards Township forced landowner to connect to the Township sewers by unlawful means. Complaint at 29 to 34. The power imposed upon the plaintiff's property was arbitrary, unnecessary, unfair and unreasonable. The sewer connection requirement was an unreasonable burden. For example: The Township should have but failed to run the sewer line far enough down the street to properly connect landowner's home. The Authority failed to properly supervise the attempted installation of the sewer "lateral" at a second alternative location. This resulted in the rupture of an "unmarked" gas main directly bordering the front of the house. A proper connection to the third and eventual location of the installation of the sewer lateral required the moving of a heating oil tank and other extraordinary property damage. There is no rational basis for requiring the landowner to connect to the sewers. Moreover, the basis for requiring plaintiff to connect to the town system was to reimburse a private builder. There is no constitutional public policy requiring landowner to connect to the Township sewers. For example, Bernards Township is still allowing new homes to be built in the township with septic systems so there apparently there is no public health issues.. Moreover, plaintiff's land is over 6 acres, clearly enough for an operational septic system. The Township's demands were cost

prohibitive and an undue and unreasonable burden on landowner. Bernards Township, with full knowledge of these hardships, including extreme inclement cold weather, maliciously issued a summons, thereby jeopardizing plaintiff's house and property. Moreover, enforcement of the law is unconstitutionally arbitrary. For example, landowner previously contracted to purchase other property in a different section of Bernards Township. (Under New Jersey law, a contract is a property right.) After the contract review period, it was determined that the septic system was failed. Mr. Felter, Senior Sanitarian Bernards Township, was notified of the septic system failure. Mr. Felter then identified the party who had violated the law by installing that failed septic system. The purchase could not be consummated until repairs to the failed septic system were made. However, instead of enforcing the law, with full knowledge of that violation, Mr. Felter threatened Mr. Barth by stating that he would condemn that other property if Mr. Barth pursued the matter. Plaintiff rescinded that contract under coercion by Mr. Felter. The power usurped upon the landowner is arbitrary, interferes with the fundamental rights of the landowner, and is repugnant to the Federal and N.J. Constitutions. Moreover, subsequent to the filing of the Complaint, through an Order to Show cause, plaintiff showed where the Township and Board of Health were permitting the construction of over a football size septic field on property within 200 feet of plaintiffs. Clearly under Counts 22 and 23, N.J.S.A. 26:3-31(d) (Sewer Connection) and the Bernards Township Board of Health Ordinance BH:13-2.2 are unconstitutionally vague and accordingly are unconstitutional under 42 U.S.C. § 1983, the Fifth and Fourteenth Amendments and the New Jersey Constitution.

Under Counts 12 through 21, the Bernards Township Tax Sale and New Jersey Statutes N.J.S.A. 54:5-19 and N.J.S.A. 40:14A-21 violate rights protected by Fifth and Fourteenth Amendments of U.S. Constitution and Art. I of the N.J. Constitution. No defendant defended its constitutionality. Peggy L. Warren, Certified Tax Collector, advertised in the Courier News that The Township of Bernards will sell plaintiff's property at a Tax Sale on April 30, 1997 at 11:00 a.m. Ms. Warren indicates the Sale is pursuant to N.J.S.A. 54:5-19 and N.J.S.A 40:14A-21. By certified mail, the property owner disputed the amount claimed owed. Bernards Township never

replied in writing to the dispute or provided an opportunity to be heard. Complaint paragraph 26. Therefore the Bernards Township Tax Sale violates plaintiff's rights protected by Fifth and Fourteenth Amendments of U.S. Constitution and Article I of the N.J. Constitution.. Accordingly, the Bernards Township Tax Sale of plaintiff's property scheduled for April 30, 1997 and New Jersey Statutes N.J.S.A. 54:5-19 and N.J.S.A. 40:14A-21 was unconstitutional under the Fifth and Fourteenth Amendments of the United States Constitution and Article I of the New Jersey Constitution. Judge Thompson refused to issue an order to show cause on this matter. Her dismissal of these counts were reversible error.

Under Counts 51 through 53, the N.J. Eminent Domain Statute N.J.S.A. 20 *et. seq* is Unconstitutional and Violates Property Rights Protected by the Fifth and Fourteenth Amendments. On March 27, 1997, PSE&G has filed suit in Superior Court, New Jersey, to exercise Eminent Domain over plaintiff's property. Public Service Electric and Gas Company v. Barth, *et. als.* SOM-L-549-97. Complaint paragraph 58. Landowner has a constitutionally protected right in his property. Id at 59. The condemnation filed by PSE&G effects that property right. Plaintiff had to obtain a variance to subdivide the property because of the land PSE&G sought to condemn. Id. at 60. As a matter of law, if a variance is required, the taking is as if the variance would not be granted. This is regardless of whether or not a variance is granted. Once a taking is effected, Landowner is required to expend additional sums of money for engineering and other costs for the purpose of acquiring a subdivision. Id. at 61.

It is clear New Jersey does not have adequate procedures for eminent domain. For example, New Jersey and Federal Court's recognize the right to be heard in one proceeding. However, the N.J. eminent Domain Statute does not provide the opportunity to be heard in one forum. Id. at 63. The New Jersey Office of Administrative Law indicated its jurisdiction is limited to that portion of PSE&G's original petition related to the eminent domain statute. Id. at 64. The OAL indicated it does not have jurisdiction to hear any of landowner's Federal or state claims or counter-claims. (This included violation of

the Federal Natural Gas Pipeline Safety Act.) There was no forum where all claims arising out of the same transaction can be heard. As a result, the landowner is subject to at least three (3) separate trials to resolve all claims arising out of a common nucleus of operative facts. The OAL process scatters all the claims so there is not coherent policy. *See also* Freehold v. Bd. Regulatory Comm., (CA 3 94-5168, January 9, 1995 *citing* Burford, (citation omitted) (no abstention because administrative procedures expensive, delayed, and uncertain) Moreover, by PSE&G's admission, the eminent domain proceedings are unconstitutional. For example: As shown in plaintiff's memo dated September 11, 1998 (supporting plaintiff's motion for injunctive relief returnable October 19, 1998), PSE&G admit they can attempt to condemn an inadequate parcel of land even if they made a mistake in the title search as to the bounds of the public right of way.

Furthermore, Judge Thompson admitted plaintiff has numerous Takings claims against Bernards Township. According to defendants, plaintiff should exhaust administrative remedies and at the same time suggest the claims are precluded by preclusion. It is clear by Judge Thompson's analysis that the N.J. Eminent Domain N.J.S.A. 20 *et. seq* is unconstitutional and violates landowner's Constitutional rights as protected by the Fourteenth and Fifth Amendments of the United States Constitution.

Thompson admitted no defendant defended the claim and committed reversible error when it *sua sponte* dismissed without notice Counts 64 through 67, that the Bernards Township Sewer Tax is Unconstitutional and violates Uniformity Clauses of Article 8 of the N.J. Constitution, Article I of the U.S. Constitution, and the Due Process Clause of the Fifth Amendment. Opinion, February 22, 1998, pages 21 - 22. Moreover, Judge Thompson misapprehends sewer taxes. Judge Thompson does not dispute that the sewer connection requirement infringed on landowners federal rights. Complaint paragraph 46. She does not dispute that there is no rational basis for the collection of the Sewer Tax and that it is an unreasonable and arbitrary imposition. She does not dispute that the collection of the tax is irrational and arbitrary since the same township can force someone to connect or disconnect to and from the sewers. She does not dispute that the Sewer authority claims it does not have to

indemnify homeowners from back-ups. She does not dispute that the tax is not uniform in the Township, the County or the State of New Jersey. Yet she misapprehends the basis for sewer taxes. It is undisputed that not all citizens in Bernards Township have to pay sewer taxes. Not all properties in Bernards Township have to be connected. That is, they do not have to pay one penny of sewer taxes. Accordingly, the requirements for the enforcement of the sewer tax are arbitrary and unconstitutional under the Uniformity Clauses of Article 8 of the N.J. Constitution, Article I of the United States Constitution, and the Due Process Clause of the Fifth and Fourteenth Amendment.

POINT X The Supreme Court ruled Property Ownership is a fundamental property right in cases such as Loretto v. Teleporter, 458 U.S. 419, (1982) that gives standing under 42 U.S.C. § 1985

Judge Thompson misapprehended 42 U.S.C. § 1985 as it applied to Bernards Township, the Bernards Township Board of Health, the Bernards Township Sewerage Authority, J. Knox Felter, Jr., and Barbara J. Pence liability for violating plaintiff's rights protected by 42 U.S.C. § 1985 (Civil Rights). Opinion February 28, 1998. Judge Thompson ruled plaintiff did not have standing to sue. However, Section 1985 applies to the deprivation of fundamental protected rights such as property ownership regardless of class or race and due process and equal protection. As shown in the undisputed RICO count, defendants conspired, acted in furtherance of the conspiracy to deny plaintiff of property rights and equal protection and due process of law before both the Municipal court and federal district court. The Supreme Court ruled Property Ownership is a fundamental property right in cases such as Loretto v. Teleporter, 458 U.S. 419, (1982). Accordingly, plaintiff had standing to sue under 42 U.S.C. § 1985.

POINT XI Plaintiff had standing to sue under 42 U.S.C. § 4001 where NJ DEP and testimony before Bernards Township Planning Board indicated Bernards Township increased flooding in a flood zone adjacent to plaintiff's property.

The NJ DEP acknowledged in its report that a Bernards Township road re-grading project created additional flooding on the plaintiff's

property. Complaint paragraph 18. Defendants Bernards Township and Mr. Messina, Township Engineer, do not dispute they did not obtain the proper permits for the re-grading project. Reply brief page 5. The purpose of the federal law is to stop flooding. 42 U.S.C. § 4001. Moreover, N.J.S.A. 2A:35A-4, 10 expressly provides for a private right of action under all federal and state environmental related statues, including those environmental claims related to the effects of flooding. *See also* National Environmental Policy Act (NEPA) and Administrative Procedure Act (citations omitted). Accordingly plaintiff properly brought a private cause of action under these acts. Moreover, the Bernards Township Planning Board approved a site plan for property within 200 feet of plaintiff's property based on testimony from the planner's testimony before the Board that the plans would raise the flood level. (The Township also approved the construction of a mammoth septic system yet previously sued plaintiff for having a system for a single-unit home. Judge Thompson erred in refusing to issue the order to show cause why that proceeding before the planning Board should not be stayed.). Accordingly, plaintiff had standing to sue under Counts 5 and 6, Bernards Township and Mr. Messina, Township Engineer as liable for violating 42 U.S.C. § 4001 and the N.J. Flood Hazard Area Control Act 58:16A-50.

POINT XII District Court Erred in Dismissing Federal Constitutional or 42 U.S.C. § 1983 Statutory Claims without reason in opposite to Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979)

Under Counts 1 through 4, Bernards Township and Mr. Messina, Township Engineer are liable for violating plaintiff's rights: protected by the Fifth Amendment of the United States Constitution; protected under the Fourteenth Amendment of the United States Constitution; protected under 42 U.S.C. § 1983; and protected by the New Jersey Constitution. Judge Thompson's analysis is unclear on these Constitutional questions. In addition, she never addressed the count under 42 U.S.C. § 1983. *See also* Lake Country Estates, Inc. v. Tahoe Regional Planning Agency 440 U.S. 391 (1979) (Local entity liable for land use regulations or decision that cause an unlawful deprivation of rights.). Judge Thompson also incorrectly dismissed

sua sponte without notice Counts 1 and 4 against defendant Messina. Judge Thompson indicated plaintiff must avail the New Jersey procedures for seeking compensation under the Fifth Amendment and the New Jersey Constitution. Opinion February 28, 1999. Judge Thompson arbitrarily applied a Fourteenth Amendment equal protection test where she suggested plaintiff lacked any fundamental constitutional right or showed Bernards Township lacked a rational basis for its action. *Id.* Judge Thompson misapprehended constitutional law. For example, Mr. Barth has a fundamental protected constitutional property right in property located at Block 133 Lot 4, located in Bernards Township, Somerset County New Jersey. In addition, Bernards Township admitted it had no recorded right of way and was in effect constructing a new road on plaintiff's property. Accordingly, defendants' had to show a compelling state interest for the actions it took. They never did and accordingly their request must be denied. Moreover, they constructed a road that caused flooding in violation of a federal statute. There is no rational basis for the defendants' actions. Judge Thompson also over-reacted to the relief being sought. Plaintiff also sought injunctive relief. *See e.g.,* Complaint Relief paragraph. Without the injunctive relief, Plaintiff is forced to pay for construction in addition to the amount resulting from the taking. For example, to lower the flood plain, for approximately $15M, plaintiff could purchase adjacent land from a Church who is looking to sell their property and build a retention basis. In addition, most of the under-ground flooding had been temporarily stopped as a result of the Bernards Township sewage system acting as a sort of a "sump pump."

POINT XIII Since 1983 plaintiff is never required to exhaust state remedies under Patsy v. Florida Board of Regents, 457 U.S. 496 (1982); Mathews v. Eldridge, 424 U.S. 319 (1976); based on the District Court ruling, the NJ Entire Controversy Doctrine is unconstitutional and the notice provision of NJ Tort claim Act do not apply.

By the Bernards Township Inverse Condemnation Defendants own admission the Claims against them should not have been dismissed with summary judgment but that summary judgment should have been entered against them. The exhaustion doctrine ordinarily has the

effect of delaying judicial review when the court orders a party to attempt to obtain relief from some place first. (Citation omitted.) This does not result in summary judgment. Moreover, defendants admit the District Court had jurisdiction under 42 U.S.C. section 1983. The Supreme Court previously held that a section 1983 plaintiff is never required to exhaust state remedies, no matter how adequate or easily exhausted those remedies might be. Patsy v. Florida Board of Regents, 457 U.S. 496 (1982); Mathews v. Eldridge, 424 U.S. 319 (1976).

Defendants suggest if there is an excuse for failure to exhaust any state remedies that the court take up the substantive issues. However, by their own admission that they do not dispute the material facts in the complaint they admit summary judgment should have been entered against themselves. They admitted by affidavit that they did install pipes on Mr. Barth's property outside what even they perceived as the Township right of way. Defendants admit a multiple of claims that if each claim had to be pursued individually shows the burdensome of the procedures and the unconstitutionality of the eminent domain acts. They suggest that a person may bring an inverse condemnation action in state court. This clearly does not preclude that a person may bring an inverse condemnation action in federal court. Moreover, appellant seeks more than just compensation. Appellant seeks other relief including fixing the root causes of the problem. For example, by the township own admissions these problems can be remedied. As stated, opposing counsel did not provide appellant with information related to the expert they hired.) Moreover, Kevin Paige, an Engineer testifying before the Bernards Township Planning Board indicated on August 3, 1999 that the Township had two separate and different plans depicting its storm water management plans. That Engineer testified that the two different plans showed varying heights of flood plains. Opposing counsel apparently withheld this information. Mr. Belardo admits his client raised the flooding of water approximately 1 foot. The purpose of the National Flood Insurance Program is to prohibit flooding. It is for a jury to determine the deprivation of appellant's rights. Accordingly summary judgment should be entered against the Bernards Township Inverse Condemnation defendants.

Under Count 68, Bernards Township, the Bernards Township Board of Health, the Bernards Township Sewerage Authority, J. Knox Felter, Jr., Barbara J. Pence, are liable for violating the N.J. Tort Claims Act N.J.S.A. 59:1-1 *et seq*. Judge Thompson misapprehended this law by dismissing for lack of Notice. Opinion February 22, 1998. For example, they are estopped from raising the defense by participating in discovery. Marley v. Palmyra, 139 N.J. super. 271 (L. 1983). They are estopped from raising the defense as they show no prejudice. Anske v. Borough of Palisades Park, 139 N.J. Super. 342 (1976). The defendants waive the defense by failure to plead earlier. Hill v. board of Ed. of Middleton Tp . 183 N.J. Super. 36 (A.D. 1982) (Default was entered against Bernards Township Sewage Authority on August 22, 1997.) They have no immunity under civil rights actions. Lloyd v. Stone Harbor, 149 N.J. Super. 496, 517 (Ch. Div. 1981). Under the Entire Controversy Doctrine, the Tort Claims Act is not a bar in that defendants first sued plaintiff. Guerro v. City of Newark, 216 N.J. Super. 66 (A.D. 1987). Moreover, the Supreme Court previously held that a section 1983 plaintiff is never required to exhaust state remedies, no matter how adequate or easily exhausted those remedies might be. Patsy v. Florida Board of Regents, 457 U.S. 496 (1982); Mathews v. Eldridge, 424 U.S. 319 (1976). Judge Thompson also misapprehended the law as it relates to motions for leave to file a late notice of claim. Opinion February 22, 1998. Defendants received constructive notice of the claims. N.J.S.A. 59:4-3. No defendants and Judge Thompson did not dispute federal jurisdiction over the Tort Claim Act. It is reversible error to suggest a federal court with jurisdiction over the act does not have jurisdiction over that portion of the act relating to filing late notices. In addition, any dismissal of such a complaint is without prejudice. Guerro v. City of Newark, 216 N.J. Super. 66 (A.D. 1987).

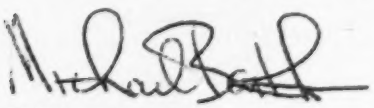
The only conclusions that can be drawn related to the New Jersey Tort Claim Act is that the Notice Provisions are Unconstitutional. Defendants do not deny the Tort Claim Act can be brought in federal district court. They suggest that only a New Jersey State Superior Court judge can extend the time to file what they perceive as a late "notice of claim" and satisfy the requirements for the same claim in federal district court. The minimum extension period would have to be the same as the statute of limitation for both federal and state court

judges. Clearly defendants received notice of the Tort Claims whether actual or constructive. In a separate incident, the Township corrected a condition by cementing the bottom of a particular storm basin adjacent to plaintiff's property. If the defendants had not sued plaintiff perhaps more of the issues could have been resolved out of court. For example, the Township appears to be looking at ways to alleviate some of the flooding in the town. However, that does not preclude plaintiff from suing in the instant case under the New Jersey Entire Controversy Doctrine. Moreover, as stated in appellant's letter-memorandum to the court on July 9, 1999, whether the defendants ever mentioned a defense to the Tort Claim was not the sole issue below but more that as a matter of law in that the defendants defaulted they waived a waivable Rule 12 defense and that they subsequently waited too long to bring a motion to dismiss on the defense and accordingly as a matter of law the defense did not apply.

CONCLUSION

For the reasons stated, Petitioner respectfully prays that a writ of certiorari issue to review the judgment below in the Third Circuit Court of Appeals in Barth v. PSE&G et al: Order filed September 28, 1999 affirming District Court Order filed February 22, 1999 CA 3 Docket 99-5190; Denial of Petition for Rehearing in CA3 Dockets 97-5368 & 98-5059; and Court of Appeals' order affirming district court order entered May 7, 1997 (denial of order to show cause for a preliminary injunction) and June 18, 1997 (denial of stay of state court proceedings and reassignment to Newark).

Respectfully submitted,



Michael Barth
December 15, 1999